Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GERARD T. O'BRIEN
Petitioner,

v.

UNITED STATES OF AMERICA,
(USDA/FDA)
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Should the USDA/FDA be allowed to steal U.S. citizen O'Brien's US Patent and US Copyright? And not have to pay restitution and compensation and damages and penalties?

2. Does the fraud deception & lies & other illegal acts, by USDA/FDA in the "takings" merit the wrath of the U.S. Supreme Court and hence additional sanctions?

3. Does the 'hurting of the public' by USDA/FDA by their actions & inactions in the "Takings" merit the wrath of the U.S. Supreme Court and hence additional sanctions? Plus mandamus action?

4. Does the refusal of the lower courts to accept jurisdiction of these matters merit some kind of remedial action by the U.S. Supreme Court? [Ping pong between lower courts!]

5. Does violation of U.S. citizen O'Brien's *Constitutional Rights* by defendant USDA/FDA merit some kind of remedial action by the U.S. Supreme Court?

6. Does ignoring of citizen's injunction request, on current infringing of a current valid US Patent and US Copyright, by the lower courts—merit remedial action by the U.S. Supreme Court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix p. — to the petition.

The opinion o fthe United States District Court appears at Appendix p. — to the petition.

JURISDICTION

The date on which the United States Court of Appeals decided my case was 13 Aug. 98.

No petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This follows in "Statement of the Case" chapter 5.0—the law involved. Under the following headings: 5.1 US Constitution—Article 1—Section 8, 5.1.1—US not allowed a copyright, 5.1.2—US Constitution—5th amend—Takings; 5.2 Patent—Doctrine of Equivalents; 5.3 Contributory, Vicarous Infringe (unfair compet); 5.4 Infringement of Patent & Ccpyright; 5.5 Right to make a living—common law; 5.6 Contributory infringing, 5.6.1 Officer and doctrine respondeat superior; 5.7 Copyright distortion, 5.7.1—Distortion, Disparagement, Publishing, 5.7.2—Copyright Act & US Govt; 5.8 Tort of Confidentiality; 5.9 Lanham Act; 5.10 Unfair Competition; 5.11 Sherman Antitrust Act; 5.12 Federal Trade Commission Act; 5.13 Unfair competition—criminal penalties; 5.14 Doctrine of Equivalents—US Supreme Court (1997); 6.0 Severability.

STATEMENT OF THE CASE

The narrative "Statement of the Case" follows in the next 16 pages.

The "statement" is divided into the following main sections: Introduction; Admissions by Defendant; O'Brien requests; the law involved; at Supreme Court; and closing.

Ladies & Gentlemen of the Supreme Court of this our United States, I come before you in this writing to implore your help, seek your intercession, seek your aid, and seek your protection.

I am hoping that you wil not despise my request, but will hear and answer my petition in my favor.

In lower court proceedings, the defendant, USDA/FDA, via their U.S. Attny, Mrs. Lori M. Beranek, *has admitted to all of the wrongdoings spelled out in my 33 page petition* to that court, docket # 2:97-CV-0145-WCO of 25 Aug. 97. I made the 3 March 1997—Supreme Court of the United States, Doc # 95-728, *Warner-Jenkinson v. Hilton Davis*—Decision—the "Keystone" in the building of my case against the defendant USDA/FDA. [This is the landmark decision on the "Doctrine of Equivalents"].

With reference to my 33 * page petition filed in the United States District Court for the Northern District of Georgia, and following the order therein, here is what defendant USDA/FDA admitted to:

Compl. p. 1. AA. p. V51/110. I. p. 1.3 wrongdoing —Federal Statutory, Constitutional, Patent, Copyright, & Common law violation.

I. p. 1.4 Illegal, unlawful acts—by USDA/FDA against plaintiff. Have been the moving, active leading, conscious forces behind the lawbreaking, & violation of, & infringing of plaintiff O'Brien's *Constitutional Legal Rights*, U.S. Patent Rights; U.S. Copyrights, Common Law, & Commercial Law rights. They combined to cause great harm & damage to O'Brien in areas of reputation (National/International) & Finances.

Compl. p. 2. AA. p. V51/111. I. p. 1.5.4. USDA/UGA, *Coauthored* a bad erroneous/libelous 'paper' & published it worldwide via the Poultry Science Association. [O'Brien obtained a copy of this 'paper' on 17 Apr 95.]

Compl. p. 3. AA. p. V51/112. I. p. 1.5.6. In USDA handbook of OK materials to use in meat processing—

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* The following abbreviations apply in this section from the Petition and Order filed in the United States District Court for the Northern District of Georgia: Complaint (Comp. p. —), Appeal Appendix (AA. p. —), Item (I. p. —).

misc pub # 1419, the USDA authorized (thus promoted) use of O'Brien's patent's chemical—baking soda on Poultry processing lines. USDA also secretly authorized use of O'Brien's patent's hydrogen peroxide, disguising it under a proprietary name via the Excel Co. of Florida. [All the time telling O'Brien to get FDA approval for the hydrogen peroxide—while they already had it authorized (promoted) in their official handbook—misc pub # 1419.].

That is Fraud & Deception.

Compl. p. 3. AA. p. V51/112. I. p. 1.7. USDA induced, aided, abetted, infringing of O'Brien's patented process in USA Poultry slaughter plants by: Mississippi State University, Alcorn University, Church & Dwight (Arm & Hammer), FMC Inc, Rhone Poulenc Inc, Excel Chemical Inc, Micropure—Don Tech Inc.

Comp. p. 4. AA. p. V51/113. I. p. 1.8. USDA induced aided abetted wrong doing by: Texas A&M University, North Carolina State University, University of Georgia Athens, Poultry Science Association.

Involved in publishing a false, fabricated, libelous—'paper'—which denigrated O'Brien's patented process & O'Brien.

[Added Note—Also "Took" O'Brien's Copyright!]

Comp. p. 4. AA. p. V51/113. I. p. 1.9. Took Plaintiff's intellectual property.

Prevented use of O'Brien's pioneer patented process.

Aided & abetted piercing together bits & pieces of O'Brien's patented "peroxi bicarb" process by others—in some poultry processing plants.

Comp. p. 7. AA. p. V51/116. I. p. 1.10.13. Infringers are now focusing on same area as O'Brien patent—i.e.—after carcass evisceration & prior to chilling.

They are using O'Brien's high velocity sprays—bulk of which is water—and substituting ingredients such as: TSP, chlorine—etc.—instead of O'Brien's hydrogen peroxide.

And—their function is the same as O'Briens—reduce pathogens, bacteria, foreign material on the poultry carcasses.

And—the result is the same as O'Briens—reduced pathogens, bacteria, foreign materials on the poultry carcasses.

Comp. p. 8. AA. p. V51/117. I. p. 2.0. Violations of O'Brien's *Constitutional* rights—intellectual property (copyright & patent), under Fifth Amendment to U.S. Constitution.

I. p. 2.2.1. Uniform Commercial Code Violation.

I. p. 2.2.2. Violation of USDA/FSIS Directive 10700.1 —Dated 4 Jul. 95.

I. p. 2.2.3. Violation of FTC Act.

I. p. 2.2.4. Disparagement under U.D.T.P.A.

Comp. p. 8. AA. p. V51/117. I. p. 2.2.5. Violation of Lanham Act.

I. p. 2.2.6. Violation of Sherman Antitrust Act.

I. p. 2.2.7. Violation of 1985 Government Ethics Law.

Comp. p. 8. AA. p. V51/117. I. p. 2.3. Defendant also *admitted* to: 1. tortious interference; 2. extortion; 3. unfair competition; 4. hindering; 5. improper actions; 6. restraint of trade & hurting public; 7. distortion; 8. held Plaintiff O'Brien back & competed with O'Brien; 9. impugned O'Brien's reputation; 10. held O'Brien to a higher standard; 11. discrimination; 12. conflict of interest; 13. touting of competing methods; 14. monopolistic behavior; 15. funding of O'Briens competitors; 16. libel; 17. patent infringement; 18. copyright infringement; 19. taking of

U.S. patent; 20. taking of U.S. copyright; 21. misappropriation; 22. misconduct in research; 23. fabrication; 24. falsification; 25. consorting for mischief; 26. abuse of power; 27. fraud; 28. mail fraud; 29. concealment of data vital to national health & safety; 30. dereliction of public safety duties & responsibilities; 31. malfeasance in office; 32. deception; 33. misrepresentation; 34. used Hatch money to breach fiduciary & confidentiality contract; 35. Intimidation; 36. tried to induce major bribe giving, 37. repeated pattern of wrong doing.

Comp. p. 9. AA. p. V51/118. I. p. 2.4. Adverse treatment of O'Brien by USDA/FDA—defendant. On patent #4,683,618 issued on 4 Aug. 87 (filed 28 July 86). Titled—"Reduction of Bacteria Count on Poultry Being Processed into Food at a Poultry Processing Plant."

[Now called: "Peroxi Bicarb" Process]

I. p. 2.4.2. Defendant *admitted* to: acting in concert (USDA/FDA) to prevent O'Brien from having his invention utilized directly. Depriving O'Brien of royalty income, etc. Interfered with O'Brien's projected mode of making a living.

I. p. 2.4.4. USDA/FDA have worked with others in attempts to go around O'Brien's U.S. patent & beat it. Which is unethical & conflict of interest, & violates USDA/FSIS Directive 10700.1.

USDA/FDA held back O'Brien while trying to get their own method & so collect the billion dollars possible in royalties.

Comp. p. 10. AA. p. V51/119. I. p. 2.4.5. USDA consorted with MSU, AU, US Farm Raised Technologies, Dupont, Conagra, & a supplier of a solid form of baking soda & hydrogen peroxide to try to go around O'Brien's patent. Consortium leader was L. Crawford while he was USDA Administrator. The PTO refused them a patent—because of O'Brien's patent.

I. p. 2.4.6. USDA/FDA consorted to use radiation—which puts hydrogen peroxide all throughout the poultry carcasses—and infringes O'Brien's patent under the doctrine of equivalents.

Comp. p. 11. AA. p. V51/120. I. p. 2.4.7. USDA & UGA consorted in a misconduct in research exercise. And UGA apparently violated federal laws 42 CFR50-103d7 & 42 CFR50-104a2.

Comp. p. 13. AA. p. V51/122. I. p. 2.4.7-16. H.R. Cross—Admin USDA/FSIS, while being paid by Texas A&M Univ. stonewalled O'Brien while he cross researched & pushed organics. So USDA/FDA defendant—*admitted* to conflict of interest & violated Sherman Act.

Comp. p. 16. AA. p. V51/125. I. p. 2.4.7-17.E.1. USDA authorized (promoted) infringing method of micropure/Don Tech in their hand book MP1-2—FSIS Dir #11220.1—Nov. 95 thus "*admitted*" they are "liable for contributory infringement of O'Brien's U.S. patent.

I. p. 2.5. *Admitted*—FDA allows use of O'Brien ingredients (baking soda/hydrogen peroxide) via Mentadent mouthwash—in people's mouths but have prevented its' use on dead chickens!

Comp. p. 17. AA. p. V51/126. I. p. 2.6.1—Defendant *admitted* that the record shows that FDA will approve whatever the USDA says in poultry slaughter plants.

I. p. 2.7—Federal Register—3 Feb. 95 USDA/FDA Defendant—"*admitted*"—O'Brien's new method is the way-to-go.

Comp. p. 18. AA. p. V51/127. I. p. 2.8—Defendant *admitted*—to other tortious interference & wrong doings.

I, p. 2.8.3—Defendant *admitted* that Blankenship of USDA/ARS/Athens—GA—Russell Research Center—wanted 15% of any royalties from O'Brien's patent.

Defendant *admitted* that O'Brien always said "No" to this.

Comp. p. 19. AA. p. V51/128. I. p. 2.8.6.3—Defendant *admitted* that ———— if Plaintiff sued U.S. Govt, USDA, FDA, they would attack Plaintiff O'Briens integrity.

Comp. p. 20. AA. p. V51/129. I. p. 2.8.6.5—Defendant *admitted* that Blankenship/ARS/USDA/ et al. had ego damage.

I. p. 2.8.6.6—Defendant *admitted* that USDA headquarters people in Washington, D.C.—twice tried to buy O'Brien off.

Comp. p. 22. AA. p. V51/131. *Admitted* to all of 2.10.4.

Comp. p. 23. AA. p. V51/132. I. p. 2.11. Defendant *admitted* to "racketeering"—although in the courtroom—Ms. Beranek said RICO could not apply to U.S.:

I. p. 2.11.1. *Admitted* to causing infringing by poultry co's—by approving & overseeing introduction of infringer's products & equipment into U.S. poultry slaughter plants.

(Note: USDA inspection in plants is "hands on"—sight, feel, smell).

Comp. p. 24. AA. p. V51/133. I. p. 2.11.2. *Admitted* to willfulness.

Comp. p. 25.1. AA. p. V51/134. I. p. 2.12.3. *Admitted* that FDA declared hydrogen peroxide was eminently safe in food in 1979 & 1983 & 1986.

I p. 2.12.7. *Admitted* that USDA/FDA allows use of hydrogen peroxide directly on/in: tripe, beef feet, herring, eggs, milk, whey, starch, cheese, tea, toothpaste, mouthwash, cornsyrup—etc.—but continue to block the O'Brien "peroxide bicarb" process on poultry carcasses.

Comp. p. 26. AA. p. V51/135. I. p. 2.13. *Admitted* to "the ultimate authority of the USDA in U.S. poultry process/slaughter plants.

Defendant *admitted* that—USDA did not need FDA approval of O'Briens process—& this was just a ploy by USDA to block O'Brien's method.

Comp. p. 21. AA. p. V51/130. I. p. 2.9. *O'Brien requested*: Summary Judgment, Declaratory Judgment.

Comp. p. 27. AA. p. V51/136. I. p. 4.0. *O'Brien requested*:

I. p. 4.1 Mandamus—28 US.C. 1361 (1994).

Compel U.S. (Sec. of Agriculture, Administrator of USDA/FSIS, & Commissioner of FDA) to perform their official, moral, ethical, fiduciary, & legal duty—and okay use of O'Brien's patented "peroxi bicarb" process in the U.S. poultry slaughter plants immediately.

And use their best efforts to have the process implemented in the plants within 6 months of the court order —without cost to O'Brien.

I. p. 4.1.2. Ordered to supply data.

I. p. 4.1.3. Ordered to pay O'Brien 2/10¢/lb.—live weight—royalty—whether they use method or not—if legal.

I. p. 4.2. Violation of O'Brien's *Constitutional* rights —28 U.S.C. 1331 (1994)—etc.

I. p. 4.2.1. *Type* of *injunction*—etc

Comp. p. 28. AA. p. V51/137. I. p. 4.2.3. *Type* of *injunction*.

I. p. 4.2.4. Restitution/compensation to O'Brien by Defendant USDA/FDA.

I. p. 4.2.6. Assess damages & penalties against Defendant.

I. p. 4.2.7. Published apology by P.S.A.

Comp. p. 29. AA. p. V51/138. I. p. 5.0. The law—involved.

I. p. 5.1. *U.S. Constitution*—Article 1—Section 8 grants O'Brien legal monopoly for his U.S. patent & his associated U.S. copyright.

I. p. 5.1.1. U.S. is not allowed to own a U.S. copyright.

—Yet USDA/UGA/PSA has "taken" O'Brien's copyright material.

I. p. 5.1.2. *U.S. Constitution*—5th Amendment prohibits U.S. from "taking" a citizens property without due compensation.

—O'Brien shall be compensated.

I. p. 5.2. Patent infringement & Doctrine of equivalents.

I. p. 5.3. Contributory, vicarious infringement—especially in unfair competition situations—consists of supplying equipment, parts, materials—to enable infringement.

I. p. 5.4. Infringement of U.S. patent, U.S. copyright, is a tort, a wrong, an injustice, & U.S. law requires compensation.

I. p. 5.5. Misappropriation & interference with a person's economic advantage is a violation of common law (making a living).

I. p. 5.6. Contributory infringing occurs when a person/entity knowingly induces, causes, materially contributes to infringing activity. This includes selling enabling equipment &/or materials.

I. p. 5.6.1. An officer—because he acts for the entity—also makes the entity vicariously or secondarily liable under doctrine of respondeat superior.

This is especially so when conduct constitutes "unfair competition." And is especially so when officer is moving active conscious force behind the infringing. (As Lester

Crawford was when he was Administrator of USDA/FSIS.

As Russell Cross was when he was Administrator of USDA/FSIS.).

I. p. 5.7. Copyright owner has right to prevent distortion of his copyrighted work.

I. p. 5.7.1. USDA/UGA copied words from O'Brien's patent, same words are also in O'Brien's copyrighted 'Trinity Report', and they distorted & disparaged O'Brien's methodology in a paper they had distributed nationally & internationally. They did this in spite of O'Brien's written objections to them.

I. p. 5.7.2. *Copyright act prevents any government body from seizing, expropriating, or otherwise exercising rights of ownership.* And, *U.S. Government can be held to be an infringer if it infringes.*

1. Fletcher/UGA in his 27 Aug. 93 letter showed his imprudence & disrespect for Plaintiff O'Brien's intellectual property.

Comp. p. 30. AA. p. V51/139. I. p. 5.8. Tort of confidentiality provides that where one party gives another—private information—on premise of confidentiality —it is unethical & an actionable wrong to use that information against its owner.

I. p. 5.9. Lanham Act—covers—blatant falsehoods, innuendo, indirect intimations, ambigious suggestions, untruthful disparagement.

I. p. 5.10. Unfair competition—covers—dirty tricks & indirect trespasses, originating physical acts [e.g.: USDA/UGA 'paper'—by Defendant interfering directly or indirectly with plaintiff's commercial advantage.

I. p. 5.11. The Sherman Antitrust Act makes illegal—every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.

I. p. 512. The Federal Trade Commission Act provides that unfair methods of competition in or affecting commerce, & unfair or deceptive acts or practices in or affecting commerce are declared unlawful.

I. p. 5.13. State & federal laws provide criminal penalties for unfair competition.

I. p. 5.14. The doctrine of equivalents—updated on 3 Mar 1997 by the U.S. Supreme Court—reinforces O'Brien's case against the USDA—etc.

Comp. p. 31. AA. p. V51/140. —Note—The additives to the Wash water—through vital—amount to only about 2% of the total wash water used. I.e.—the process is about 98% clean water.—This is very significant when considering infringes such as Rhone Poulenc's TSP method.

Comp. p. 31. AA. p. V51/140. I. p. 6.0. "Severability" clause.

The court was requested to ignore any part of petition not allowed by the rules of the court. And at same time allow to stand—Those other parts of petition allowed by the Court's rules.

Comp. p. 32. AA. p. V51/141. I. p. 9.0. O'Brien respectfully requests the *Supreme Court* to allow him to stand on his written word. My public speaking skills are not so good. And instant memory recall is slow in public speaking situations.

Comp. p. 33. AA. p. V51/142. I. p. 13.0. "Demand for Judgment."

Plaintiff petitioner O'Brien respectfully requests the *Supreme Court of the United States* to find & rule in his favor & to render judgment as specified earlier in 2.9 & 4.0.

CLOSING

In closing O'Brien wishes to say that he has proven that the local Federal Court in Gainesville always had jurisdiction of this matter. The Federal Claims Court has been very emphatic that they do not have jurisdiction. So the U.S. Court of Appeals for Federal Circuit had jurisdiction. O'Brien's suits have been timely, and at the same time it should be noted that parts of O'Brien's case are timeless when it comes to a valid current U.S. Patent & ditto for a valid current U.S. Copyright. And my patent & copyright are valid & current. And this would include request for *injunction* against further & ongoing infringement of my Patent & Copyright by defendant. (Ref. 4.0).

And this would also include request for mandamus to compel "Department of Agriculture" to okay use of O'Brien's "Peroxi Bicarb" process in the US Poultry Plants—and pay royalty to O'Brien whether they use the process or not.

And this would include published apology by PSA, USDA & UGA. (Ref: 4.2.7).

And any other remedy that the U.S. Supreme Court feels is merited & warranted.

Petitioner O'Brien is assuming that the Supreme Court will request "the record of proceedings" from the U.S. Court of Appeals for the Federal Circuit. [# 98-1280].

Thanking all of you in anticipation.

REASONS FOR GRANTING THE PETITION

O'Brien believes that his petition is necessary and could be granted because of the following reasons:

1. The vital importance of the issue to public health & safety.

2. The issue is important beyond the particular facts/ parties involved and revolves around USDA/FDA con-

sorting to steal a citizens invention. U.S. Patent, and associated U.S. Copyright. The question is who will be next to lose their intellectual property rights to these agencies?

Our fundamental, basic, constitutional, patent & copyrights, are sorely threatened & jeopardized by such USDA/FDA actions—unless the Supreme Court takes decisive action to show them that they cannot get away with such illegal fraudulent actions.*

Petition necessary because:

1. Public Health & Safety.

1a. Quick & Just action by the court in having O'Brien's "Peroxi Bicarb" process implemented into USA poultry slaughter plants could possibly save lives & prevent millions of sickness episodes. Presently there are about 4,000 + untimely deaths per year in the USA due to food poisoning, & about 6,000,000 + unnecessary sickness episodes, supposedly costing the nation an estimated 6 Billion dollars per year in medical costs & in "lost production" costs.

If we can even cut these numbers in half with use of the O'Brien "Peroxi Bicarb" process it will be well worth it.

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* O'Brien has only recently had a final "moment of truth" on the "accrual" of damages question. Viz: in courtroom meeting on 31 Dec 97, O'Brien declared that it was only recently that he had realized that defendant USDA/FDA, via Attorney Beranek of Justice Dept, had "admitted" to all of O'Brien's petition's charges via Ms Beranek's 12b, 6 motion. No one in court gainsaid that statement by O'Brien. And so O'Brien has now concluded that that event in time is the "moment of truth", i.e., O'Brien finally knew that he knew that he knew that all of O'Brien's charges were truly well founded in FACT & IN LAW.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Pro Se

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1280

GERALD T. O'BRIEN,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: August 13, 1998

Before MAYER, *Chief Judge*, and RICH and PLAGER, *Circuit Judges.*

PER CURIAM.

Gerald T. O'Brien appeals from the 13 February 1998 Judgment of the United States District Court for the Northern District of Georgia, No. 2:97-CV-145-WCO, dismissing his compalint under Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction. We *affirm* the decision of the district court for the reasons set forth in its opinion. While we do recognize that rather than dismiss, the district court should have transferred under 28 U.S.C. § 1361 that portion of the case brought under 28 U.S.C. § 1498 to the Court of Federal Claims if such transfer were in the interest of justice; such a transfer would have been futile in this case because the statute of limitations had run. *See* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues").

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/13/98

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if they party is not represented by counsel, to the party

pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

JAN HORBALY
Clerk

[Filed Feb. 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:97-CV-145-WCO

GERARD T. O'BRIEN,
Plaintiff,

v.

UNITED STATES,
Defendant.

ORDER

The captioned case is before the court for consideration of some thirty motions which have been filed by the plaintiff, Gerard O'Brien, as well as defendant United States' motion to dismiss [30-1]. A hearing was held in the federal district court in Gainesville, Georgia, on December 31, 1997 at which time both parties were present to discuss these motions. Because a positive determination of defendant's motion to dismiss would be dispositive of the remaining motions, it will be first addressed.

Plaintiff has made countless allegations in his complaint, many of which are of dubious clarity. However, the court does not wish to dismiss this case on the basis of Federal Rule of Civil Procedure 8(a)(2)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief" only to have the claim resurface in a perhaps different but equally incomprehensible state. Additionally, the court notes plaintiff's pro se status and will therefore afford him greater latitude. For these reasons the court will attempt to decipher plain-

tiff's complaint and determine whether it withstands defendant's motion to dismiss.

Facts

In this action plaintiff seeks appropriate relief for the alleged infringement of Patent No. 4,683,618 issued to plaintiff on August 4, 1987, and its associated copyright certificate No. TXU 271,692. Plaintiff alleges a series of continuing violations through which his intellectual property has been "taken" by the government. The alleged taking occurred through both the government's prevention of plaintiff's use of his patented process as well as by the government's aid and inducement of others' infringement of plaintiff's property through their unlicensed use of his process. In his complaint plaintiff includes a laundry list of laws which "would also appear to have been violated in the commission of the infringement. . . ." Complaint at 8-9. The Court will therefore analyze what it perceives to be plaintiff's various claims.

Jurisdiction

Plaintiff claims this court has jurisdiction under 28 U.S.C. §§ 1331,[1] 1332,[2] and 1338.[3] However, under the doctrine of sovereign immunity, the federal government must consent to be sued. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349 (1980). It is well estab-

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[1] The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331.

[2] The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between citizens of different States. . . . 28 U.S.C. § 1332.

[3] The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases. 28 U.S.C. § 1338(a).

lished that the United States is immune from suit unless sovereign immunity has been waived. *See Kentucky v. Graham*, 473 U.S. 159, 165-67, 105 S.Ct. 3099, 3105 (1985); *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767 (1941). Absent an express statute waiving sovereign immunity, the district court lacks jurisdiction to entertain an action against the United States, thereby requiring dismissal. *DiVosta Rentals v. Lee*, 488 F.2d 674, 679 (5th Cir. 1973).

Sections 1331, 1332, and 1338 operate merely as grants of general jurisdiction and require an accompanying waiver of sovereign immunity. Multiple courts have determined that section 1331 does not constitute a waiver of the federal government's sovereign immunity. *See, e.g., Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972) and *Sellers v. United States*, 569 F. Supp. 1149, 1154 (N.D. Ga. 1983). While 28 U.S.C. §§ 1331 and 1332 confer subject matter jurisdiction over the defined actions, they are not in themselves waivers of sovereign immunity. They do not confer personal jurisdiction over any party to the actions. *See Duplantier v. United States*, 606 F.2d 654, 663 n.19 (5th Cir. 1979) (noting that section 1331 does not constitute a waiver of sovereign immunity but only grants federal courts certain subject matter jurisdiction and stating, "[t]he concepts of personal and subject matter jurisdiction are separate and distinct."). This court finds this analysis applicable to section 1338 as well. Like sections 1331 and 1332, section 1338 is a statute which confers jurisdiction of specified subject matter to the federal district courts, as opposed to the state courts. *See, e.g., Croydon Co., Inc. v. Unique Furnishings, Ltd.*, 831 F. Supp. 480, 487 (E.D.N.C. 1993) (following the exclusive jurisdictional provision in section 1498).

Accordingly, in order to bring suit against defendant United States, there must be some statute which provides a waiver of the federal government's sovereign immunity for each claim. The court will therefore proceed to in-

vestigating whether such a waiver exists as to plaintiff's claims.

1. Infringement claim

Plaintiff alleges that his patented process has been infringed through the unlicensed use of various organizations, including the USDA and FDA. In its motion to dismiss, defendant argues that this court has no jurisdiction over the claim because 28 U.S.C. § 1498 provides for exclusive jurisdiction in the United States Court of Federal Claims for claims of infringement against the United States. Section 1498(a) provides:

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

28 U.S.C. § 1498(b) similarly supplies an exclusive remedy in the Court of Federal Claims for infringement "by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the government and with the authorization of the government. . . ."

Often section 1498 arises in the context of a suit by a patent or copyright holder against some private, i.e. non-governmental, person or entity. In such cases, the defendant attempts to use the section to escape liability for the role it played in the infringement, arguing that the plaintiff's exclusive remedy lies in a suit against the United States in the Court of Claims. In these cases, there is some dispute among the courts about whether section 1498 should be viewed as a jurisdictional statute or as an affirmative defense. *See, e.g., Herbert v. Nat'l*

Academy of Sciences, 974 F.2d 192, 196 (D.C. Cir. 1992); *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 554-55 (Fed. Cir. 1990); *Croydon*, 831 F. Supp. at 486.

In the realm of cases brought against the United States itself, however, section 1498 should be seen as a jurisdictional statute which waives sovereign immunity in the limited circumstances provided by the section. *See, Manville*, 917 F.2d at 555 n.6 (noting that 1498 creates different effects depending on the nature of the party raising it; the court saw no inconsistency between interpreting section 1498(a) as a jurisdictional statute in suits against the United States and as merely codifying a defense that private parties may raise on the merits). *See also Zimmerman v. United States*, 422 F.2d 326, 328 (3rd Cir.), *cert. denied*, 399 U.S. 911 (1970) (holding that in conferring a right of action against the U.S. in section 1498, "Congress thereby relinquished governmental immunity and consented to suit in the Court of Claims in carefully circumscribed situations.").

Section 1498 is an exclusive remedy for infringement suits against the United States. *Zimmerman*, 422 F.2d at 328; *Hughes Aircraft Co. v. Messerschmitt-Boelkow-Blohm*, 437 F. Supp. 75, 76 (M.D. Fla. 1977), *aff'd*, 625 F.2d 580 (5th Cir. 1980),[4] *cert. denied*, 449 U.S. 1082 (1981). To the extent that plaintiff may have a mertorious claim against the United States for infringement, therefore, his remedy lies only in the United States Court of Claims.[5] However, section 1498 waives sovereign immunity only with respect to a direct governmental in-

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to Oceber 1, 1981.

[5] Because this court does not possess jurisdiction over plaintiff's infringement claim against the United States, the court will not reach the substantive issues surrounding this claim.

fringement of a patent. The doctrine of sovereign immunity applies "with full force" to any action for infringement outside the scope of consent which the government has provided in section 1498. *Zimmerman*, 422 F.2d at 328.

> Activities of the Government which falls short of direct infringement do not give rise to governmental liability because the Government has not waived its sovereign immunity with respect to such activities. Hence, the Government is not liable for its inducing infringement by others, for its conduct contributory to infringement of others, or for what, but for section 1498, would be contributory (rather than direct) infringement of its suppliers. Although these activities have a tortious ring, the Government has not agreed to assume liability for them.

Decca Ltd. v. United States, 640 F.2d 1156, 1167 (Cl. Ct. 1980), *cert. denied*, 454 U.S. 819 (1981). In other words, to the extent that plaintiff's claim is one of indirect infringement by the United States, it will be defeated by the United States' sovereign immunity protection. Accordingly, defendant's motion to dismiss plaintiff's claim of infringement is hereby GRANTED.

II. Claim under the Food, Drug and Cosmetic Act

One of plaintiff's claims against the government seems to stem from the Food and Drug Administration (FDA) and the U.S. Department of Agriculture ("USDA")'s decisions not to approve the process for which he holds a patent. In its motion to dismiss, the U.S. argues that this claim should also be dismissed from this court for lack of jurisdiction.

Review of an FDA decision denying a petition lies exclusively within the federal court of appeals. *Community Nutrition Inst. v. Novitch*, 583 F. Supp. 294, 296 (D.D.C. 1984), *aff'd*, 583 F.2d 1356 (D.C. Cir.

1985). The Food, Drug, and Cosmetic Act states that "any person who will be adversely affected [by an order approving or denying a petition] may obtain judicial review by filing in the United States Court of Appeals. . . ." 21 U.S.C. § 348(g)(1). Accordingly, this court lacks jurisdiction over plaintiff's claims that his process should have been approved. Defendant's motion to dismiss plaintiff's claim regarding the agency decisions is therefore GRANTED.

III. Tort Claims

Plaintiff seems to allege that the United States committed certain tortious acts, including interference with contract rights and business relations. The Federal Tort Claims Act ("FTCA"), 29 U.S.C. § 1346(b) generally authorizes suits against the United States for tort claims. However, defendant argues that a procedural requisite to a claim under the FTCA is that administrative remedies be exhausted. Defendant points out that plaintiff has not established that he has met this exhaustion requirement.

28 U.S.C. § 2675(a) requires a claimant to first present his tort claim to the appropriate federal agency and receive a final disposition before instituting a legal action against the United States. Noncompliance with § 2675 deprived the claimant of federal court jurisdiction over his claim. *Davis v. Marsh*, 807 F.2d 908, 911 (11th Cir. 1987) (citing *Adams v. United States*, 615 F.2d 284, 290 (5th Cir. 1980)). From plaintiff's pleadings it does not apear that he filed a separate administrative tort claim in this matter. Plaintiff O'Brien has failed tc exhaust his administrative remedies and his tort claims against the United States are due to be dismissed. *See, e.g., Bracken v. United States*, 913 F.2d 858, 859-60 (11th Cir. 1990). Defendant's motion to dismiss plaintiff's tort claims is hereby GRANTED.

IV. Constitutional, RICO, Antitrust Claims

Plaintiff alleges that the United States has violated his constitutional rights, pointing particularly to a violation of the Takings Clause. It also seems that plaintiff may be alleging RICO or antitrust violations. Defendant argues that the United States has not waived its immunity from liability from such claims.

Once again, defendant is correct in pointing out the general immunity of the United States from suit, absent a waiver. This Court is not aware of any waiver of sover-eign immunity by the United States which would permit plaintiff's claims directly against the United States based on alleged constitutional violations. *See, e.g., McCollum v. Bolger,* 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987). Likewise, the United States has not waived its sovereign immunity from RICO, *see Berger v. Pierce,* 933 F.2d 393, 397 (6th Cir. 1991), or antitrust, *see Sea-Land Serv., Inc. v. The Alaska R.R.,* 659 F.2d 243, 245 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 919 (1982), suits. Therefore, defendant's motion to dismiss as to these claims is hereby GRANTED.

Conclusion

In accordance with the above discussions, the court hereby GRANTS defendant United States motion to dismiss plaintiff's claims in their entirety [30-1]. All remaining motions are hereby DENIED as moot [3-1], [5-1],[6-1 through 6-7], [8-1], [10-1], [11-1], [13-1], [14-1], [15-1], [16-1], [17-1], [20-1], [23-1], [25-1], [29-1], [32-1], [33-1], [34-1], [35-1], [40-1], [41-1], [42-1], [43-1], [44-1], [45-1], [47-1], [48-1], [49-1], [50-1], [54-1].

IT IS SO ORDERED this 1th day of February, 1988.

/s/ William C. O'Kelly
WILLIAM C. O'KELLY
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:97-CV-145-WCO

GERARD T. O'BRIEN,

Plaintiff,

vs

UNITED STATES,

Defendant.

JUDGMENT

This action having come before the court, Honorable William C. O'Kelly, Senior United States District Judge, for consideration of defendant's motion to dismiss and, the court having granted defendant's motion, it is ORDERED AND ADJUDGED that the plaintiff, GERARD T. O'BRIEN recover nothing, that the action be dismissed, and that the defendant recover of the plaintiff the costs of this action.

Dated at Gainesville, Georgia this 13th day of February, 1988.

LUTHER D. THOMAS
Clerk

By: /s/ Johnnie Sanders
Deputy Clerk

Filed & entered in Clerks Office this 13th day of February, 1998.

LUTHER D. THOMAS
Clerk

By: /s/ J. Sanders
Deputy Clerk

[Filed Apr. 6, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:97-CV-145-WCO

GERARD T. O'BRIEN,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

The captioned Case is before the Court for consideration of plaintiff Gerard O'Brien's motion for reconsideration [69-1]. O'Brien seeks a reconsideration of the court's order dated February 13, 1998, which granted defandants' motion to dismiss [66-1].

The local Rule governing motions for reconsideration states:

> Motions for reconsideration *shall not be filed as a matter of routine practice.* Whenever a party or attorney for a party believes it is *absolutely necessary* to file a motion to reconsider . . . [it] shall be filled with the Clerk of the Court within 10 days after the entry of the order or judgment.

LR 7.2E, NDGa. (emphasis added). As indicated by the language of the aforementioned local rule, motions for reconsideration are not to be filed as a matter of course. In fact, the term "motion for reconsideration", as such, does not appear in the Federal Rules of Civil Procedure.

The title of FED. R. CIV. P. 60(b), under which a so-called motion for reconsideration may be brought, further attests to its extraordinary nature ("Relief From Judgment or Order—Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc."). "[Rule 60(b)] is properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship' . . . ." *Mohammed v. Sullivian*, 866 F.2d 258, 260 (8th Cir. 1989) (*quoting Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987)). The motion should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice. *See, e.g., Kern-Tulare Water District v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

Plaintiff O'Brien falls far short of meeting this onerous standard. Accordingly, O'Brien's motion for reconsideration is hereby DENIED [69-1].

IT IS SO ORDERED this 6th day of April, 1988.

/s/ William C. O'Kelly
WILLIAM C. O'KELLY
Senior United States District Judge

[Filed Apr. 6, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:97-CV-145-WCO

GERARD T. O'BRIEN,
Plaintiff,

v.

UNITED STATES,
Defendant.

ORDER

The captioned case is before the court for consideration of plaintiff Gerard O'Brien's motion to quash [74-1] [74-2]. As the court has denied plaintiff's motion for reconsideration, these motions are DENIED AS MOOT.

IT IS SO ORDERED this 6th day of April, 1998.

/s/ William C. O'Kelly
WILLIAM C. O'KELLY
Senior United States District Judge

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 97-419C
(Filed June 25, 1997)

GERARD T. O'BRIEN,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

This matter is before the court on plaintiff's *pro se* complaint. Plaintiff alleges a taking and infringement of his patent by defendant's agencies, the United States Department of Agriculture and the Food and Drug Administration, as well as other entities, including universities, private corporations and trade organizations. Plaintiff contends that defendant's illegal activities began in 1986 and continue to the present. His requested relief includes mandamus, pursuant to 28 U.S.C. § 1361 (1994), to compel defendant to approve the use of plaintiff's patent, declaratory judgment, and injunctive relief. The court determines that plaintiff's complaint must be dismissed as beyond the jurisdiction of this court.

First, plaintiff cites 28 U.S.C. § 1331 (1994), as the basis for the court's jurisdiction over his complaint. Section 1331, however, vests federal jurisdiction exclusively in the federal courts. It does not extend such jurisdiction to the United States Court of Federal Claims. *See Yount v. United States*, 23 Cl. Ct. 372, 373 n.1 (1991);

Kennedy v. United States, 19 Cl. Ct. 69, 72 n.2 (1989). By contrast, this court's jurisdiction is set out in the Tucker Act, 28 U.S.C. § 1491 (1994), *as amended by* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3874-75 (1996). Pursuant to the Tucker Act, the court may "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Id.; see also Brown v. United States*, 35 Fed. Cl. 258, 264 (1996), *aff'd* 105 F.3d 621 (Fed. Cir. 1997).

Even considering plaintiff's complaint in this context, however, the court must conclude that plaintiff's claims are time-barred under the applicable statute of limitations. Pursuant to 28 U.S.C. § 2501 (1994), actions under the Tucker Act are time-barred if they are not filed within six years of the date the claim accrued. Because the statute of limitations is jurisdictional, a plaintiff's failure to comply places the claim outside the court's jurisdiction. *Soriano v. United States*, 352 U.S. 270, 273-74 (1957). Here, plaintiff alleges that "damages began to accrue back in 1987," [1] almost ten years before this action was filed. Thus, plaintiff's claims are "beyond the court's power to hear and decide." *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 404 (1994); *see generally Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1967) (holding that a claim accrues when all events fixing defendant's alleged liability have transpired).

Further, in delineating the court's jurisdiction, the Tucker Act specifically excludes tort claims. § 1491

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[1] Complaint at 1, § 3.4. Although plaintiff indicates that defendant's alleged illegal activities commenced in 1986, he states that damages began to accrue in 1987. The distinction is immaterial because the statute of limitations has run in either case.

(a)(1); *see also Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993); *Brown*, 35 Fed. Cl. at 264. Plaintiff's complaint, however, includes allegations of "tortious interference, libel . . . fraud . . . extortion."[2] It is clear the court lacks jurisdiction over such claims. *See L'Enfant Plaza Properties, Inc. v. United States*, 645 F.2d 886, 892 (1981) (listing fraud as a tort claim).

Finally, the court lacks authority to grant plaintiff's requested relief. With regard to plaintiff's request for mandamus, the court notes that § 1361 grants federal district courts the exclusive authority to compel an agency or officer of the United States to perform a duty owed to a plaintiff. *See Yount*, 23 Cl. Ct. at 373 n.1. This court is therefore without jurisdiction to consider plaintiff's mandamus request. Similarly, this court lacks authority to grant plaintiff's request for declaratory and injunctive relief. The jurisdiction of this court, with limited exceptions, is restricted to monetary claims against the United States. *United States v. Sherwood*, 312 U.S. 584, 588 (1941). The court lacks jurisdiction to grant equitable relief, unless it is subordinate to monetary damages. *Doko Farms v. United States*, 13 Cl. Ct. 48, 56 (1987).

Therefore, plaintiff's complaint, being clearly outside the court's jurisdiction, is DISMISSED.

IT IS SO ORDERED.

/s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

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[2] *Id.* at 7, § 4.0.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 97-419C
(Filed July 11, 1997)

GERARD T. O'BRIEN,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

Plaintiff's filing, received by the Clerk's Office on July 8, 1997, and considered by the court as a request for reconsideration of the decision issued on June 25, 1997, is hereby DENIED.

IT IS SO ORDERED.

/s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

[Filed Jun. 30, 1997]

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

CD # 59 PTP3-51

No. 97-419C

GERARD T. O'BRIEN,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's order of June 25, 1997,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, being clearly outside the court's jurisdiction.

June 30, 1997

DAVID A. LAMPEN
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs.* Filing fee is $105.00.

[Filed Apr. 19, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:95-CV-156-WCO

GERARD T. O'BRIEN,
Plaintiff,

v.

U.S. GOVERNMENT; U.S. DEPARTMENT OF AGRICULTURE; FOOD AND DRUG ADMINISTRATION; UNIVERSITY OF GEORGIA; TEXAS A&M UNIVERSITY; NORTH CAROLINA STATE UNIVERSITY; MISSISSIPPI STATE UNIVERSITY; ALCORN UNIVERSITY; POULTRY SCIENCE ASSOCIATION; DWIGHT & CHURCH INC./ARM & HAMMER INC.; FOOD MACHINERY CORP.; RHONE POULENC INC.; EXCEL CHEMICAL CO., INC.; MICRO PURE/DON TECH, INC.;
Defendants.

ORDER

The captioned case is before the court for consideration of Plaintiff Gerard T. O'Brien's motions "to squash" and "to stand on his written word" [114-1, 116-1] and Defendants Dontech, Inc. and Micro-Pure, Inc.'s motion to strike [115-1]. By order dated March 20, 1996, the court dismissed Plaintiff's complaint in this case. All motions pending before the court were rendered moot by the court's order of dismissal. Accordingly, Plaintiff's motions "to squash" and "to stand on his written word" [114-1, 116-1] and Defendants Dontech, Inc. and Micro-Pure, Inc.'s motion to strike [115-1] are hereby DENIED AS MOOT.

IT IS SO ORDERED this 19th day of April, 1996.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

[Entered on Docket Apr. 25, 1996]

[Filed Mar. 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil No. 2:95-CV-156-WCO

GERARD T. O'BRIEN,

Plaintiff,

v.

U.S. GOVERNMENT; U.S. DEPARTMENT OF AGRICULTURE; FOOD AND DRUG ADMINISTRATION; UNIVERSITY OF GEORGIA; TEXAS A&M UNIVERSITY; NORTH CAROLINA STATE UNIVERSITY; MISSISSIPPI STATE UNIVERSITY; ALCORN UNIVERSITY; POULTRY SCIENCE ASSOCIATION; DWIGHT & CHURCH INC./ARM & HAMMER INC.; FOOD MACHINERY CORP.; RHONE POULENC INC.; EXCEL CHEMICAL CO., INC.; MICRO PURE/DON TECH, INC.;

Defendants.

ORDER

The captioned case was before the court for a status conference on March 18, 1996.

On December 6, 1995, plaintiff Gerard T. O'Brien filed his *pro se* complaint alleging, *inter alia,* patent and copyright infringement, anti-trust violations, RICO violations, fraud, and various business torts. The complaint is 77 pages long, with over 1,000 pages of attached appendices. Plaintiff has failed to serve the appendices on Defendants, and has instead offered to sell them to each defendant for $5,000.00.

Rule 4 of the Federal Rules of Civil Procedure requires that a plaintiff serve each defendant with a sum-

mons and a copy of the complaint. The Federal Rules further provide that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed. R. Civ. P. 10(c). Thus, plaintiff has violated the Federal Rules in refusing to serve defendants with the appendices to his complaint. At least two of the defendants have incurred substantial cost in paying the clerk for copies of plaintiff's appendices.

Plaintiff has also violated Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires that the party seeking relief file "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule requires that a complaint be short in order to avoid placing "an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir. 1988) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281).

In the instant case, plaintiff's complaint constitutes a blatant violation of the requirements of Rule 8. The volume and form of the complaint make it difficult to sort out the elements of plaintiff's claims. Plaintiff O'Brien has failed to adhere to the basic requirements of the Federal Rules of Civil Procedure in this case. "Even *pro se* litigants . . . must meet certain minimal standards of pleading [and] adhere to the rudimentary dictates of civil procedure." *Holsey v. Collins,* 90 F.D.R. 122, 128 (D. Md. 1981) (citations omitted). Accordingly, plaintiff's complaint is hereby DISMISSED WITHOUT PREJUDICE. *See Hartz v. Friedman,* 919 F.2d 469, 471 (7th Cir. 1990) (finding district court empowered to dismiss complaint for failure to comply with Rule 8); *Salahuddin,* 861 F.2d at 42 (approving *sua sponte* dismissal); *Kleinschmidt v. Liberty Mut. Ins. Co.,* 142 F.R.D. 502, 505 (S.D. Fla. 1992), *aff'd,* 8 F.3d 35 (11th Cir. 1993),

cert. denied, 114 S. Ct. 2112 (1994) (accord); *Holsey* 90 F.R.D. at 128 (accord).

All motions pending before the court are rendered moot by the court's order of dismissal. Accordingly, all pending motions are hereby DENIED AS MOOT.

IT IS SO ORDERED this 20th day of March, 1996.

/s/ William C. O'Kelly
WILLIAM C. O'KELLY
United States District Judge

[Entered on Docket Mar. 22, 1996]

Communication with the Court
Case # 2:97-CV-0145-WCO
Filed: 25 Aug 97

1.0 Now comes Gerard T. O'Brien of 2162 Skyline Dr., Gainesville, Ga, 30501, and respectfully submits to the court a request to consider the 3rd MARCH 97 [#95-728] Supreme Court decision to be a "KEYSTONE" in O'Brien's building of his case against U.S. defendants USDA/FDA.

1.1 This Supreme Court decision is heavily quoted in O'Brien's complaint, filed 25 Aug 97, in section 1.0—"JURISDICTION STATEMENT" as paragraphs 1.10-ETC—Ref: pages 4 through 7 of O'Briens 33 page COMPLAINT/PETITION.

2.0 Definition of "KEYSTONE"—Ref:: Dictionary: "The topmost stone in an arch, wedge shaped and holding the entire structure solidly in place"

3.0 The Supreme Court—Decision dated *3rd Mar 97* is a definition of the DOCTRINE OF EQUIVALENTS where U.S. Patent Law is concerned. And it apparently supports & reinforces O'Brien's claims of patent Infringement, etc. by entities operating in the poultry industry under USDA AEGIS.

3.1 Section # 8 of O'Briens *77 page* Petition filed with court of *6 Dec 95* details O'Brien's claims in this regard as # 8.2 etc on page 68, etc. [Case # 2:95-CV-0156-WCO].

3.1.1 However several lawyers for defendants appeared to reject O'Brien's claims & arguments in this area. Notably L. Nodine. for Rhone Poulnec Inc. & a lawyer for DonTech—and so on. This occurred during the 18 Mar 1996 courtroom hearings, etc.

3.2 This 3 Mar 97 Supreme Court decision clinches the matter in O'Brien's favor, as far as O'Brien can see.

And, indeed appears to demolish the defenses put up by defendants during the 2:95-CV-0156-WCO case.

3.2.1 Hence the Supreme Court decision becomes "A REASON FOR BEING" or a "KEYSTONE" in O'Brien's pursuit of Justice for the wrongs done to him by the defendants. And, it only became available to O'Brien after 3 March 1997. And O'Brien sued again on 25 Aug 1997, using this as a "KEYSTONE" in his case against defendants.

3.2.2 I say all that to say this: final "OBrien Know-Knowledge" of the rightness of his cause did not conclusively occur until he obtained a copy of the 3rd March 97 Supreme Court decision; # 95-728.

This was probably shortly after the Wall Street Journal article that mentioned the "Decision" on or about 30 June 97. (O'B Ref: V50—pg 12).

This exact date may be possible to obtain from O'Brien's record—if that becomes necessary in the future.

Hence any statutory time defense should in all probability by measured from 3rd March 1997 or or 30 Jun 97.

3.2.3 Thus Ms Beraneks claims of statutory time limitations are further invalidated given the foregoing. Since on the tort claim O'Brien would have 2* years from the 3 Mar 97 or 30 Jun 97 date. During which he could sue. And of course I sued via this case # 2:97-CV-0145-WCO on 25 Aug 97.

4.0 Not with standing Ms Beranek's pursuit of procedural matters & technicalities [which O'Brien believes to be in error] the constitutional question should cause Ms. Beranek of the Justice Dept to take pause!

4.1 The 5th amendment clause to the constitution is brilliantly clear on the matter of "taking." If the U.S.

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* Laches is of course 6 years on infringing of the patent.

government takes a citizens property then the U.S. is LEGALLY REQUIRED to compensate that citizen completely and totally. [Even if the citizen did not claim all that they were entitled to—the U.S. shall compensate totally].

5.0 Respectfully submitted to the Court.

Thanking you in anticipation, best regards.

/s/ Gerard T. O'Brien
GERARD T. O'BRIEN
2162 Skyline Dr.
Gainesville, GA 30501
(770) 532-7367
21 Jan. 98

COMMUNICATION WITH COURT

Case #2:97-CV-0145-WCO

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1. REF: Transcript of 31 Dec. 97 hearing.

2. Various Pertinent Points of Law & Rules; And Log.

3. REF: O'Connors Federal Rules—Civil Trials—1997.

Note: The discussion during the 31 Dec. 97 hearing in the courtroom—continues to require some additional comments to clarify points of Law & Rules, and to apply some logic to situation.

Now comes Plaintiff Gerard T. O'Brien of 2162 Skyline Dr., Gainesville, GA 30501. And respectfully submits the following for the Court's consideration:

1.0 During the courtroom hearing, Defendant's lawyer Ms. Beranek mentioned a 2 Year 'Window' connected with the 'Admin Remedies' aspect [O'Brien has adequately answered this already—so no need to do so again].

However, Ms. Beranek appears to have overlooked the "*6 Year Window*"—and this will now be addressed here: 1.1—28 USC 2401—"Time for commencing action against U.S." REF: O'Connor—PG864.

A civil action commenced against U.S. shall be barred unless complaint is filed within 6 Years after right of action first *accrues*.

1.1.1 The word "Accrue" in 2401a is very important; a dictionary defines it as:

"To result as a natural growth or addition"

"To come as a natural or proper increment"

1.1.1.1 And so it is in this civil case—as explained before—first inkling of USDA/FDA illwill showed up in 1992 when they said they were dropping the O'Brien Petition to FDA, i.e., FAP #7A4045. [Later; they, of their own volition, resurrected this 7A4045].

1.1.1.2 —The 'Bad Paper' issued by USDA/UGA/PSA in 1993; and received by O'Brien around April 95 was the next inkling—and raised red flag warning signals all over the place!

1.1.1.3 —The USDA handbook for poultry plants which authorizes & therefore promotes—OK products for U.S. Poultry Slaughter Plants—when received by O'Brien in Mar 95—was another (cumulative) jolting signal. Because it listed Excel Co's—"Excell tripe bleach" as ok to use on poultry carcasses in scald tanks. O'Brien pursued USDA about this; & has a USDA memo admitting that this product is baking soda—and hydrogen peroxide —under the "Secret"—proprietary name of "Excel Tripe Bleach".

1.1.1.3-1 So while USDA was telling O'Brien to obtain FDA approval, they had it okayed already for poultry—in USDA handbook.—This is major fraud!!

1.1.1.4 —The US Supreme Court issued a ruling on the 'Doctrine of Equivalents' (U.S. Patents) on 3 Mar 97—and O'Brien received a copy of this from a clerk of the Supreme Court a few days after 6 May 97. (Mail date: 6 May 97). (Ref Vol 32/O'Brien —pg 1 & 2).

This backs up O'Brien's legal reasoning that infringing of his US Patent #4,683,618 was occuring.

Because facts and law are both needed in a US Civil Suit—this more or less completed and 'concreted' O'Brien's building of his case against USDA/FDA.

1.2 And so O'Brien's case "*Accrued*"; and might be said to "emerge", "come to hand", "arise", "spring" on or about *6 May 97* when 1.1.1.4, above occured.

2.0 During the same court room hearing, on 31 Dec 97, Ms. Beranek also pressed her theory on tort procedure. And O'Brien has adequately dealt with this before —showing that O'Brien's case is proof against Ms. Beranek's assertions.

2.1 However, it will do no harm to draw attention here—To 28 USC 2401b and its effects on this matter—

2.1.1—* 28 USC 2401b reads in part:

Tort claim against U.S. shall be forever barred unless it is *presented in writing* to appropriate federal agency within 2 years after such claim *Accrues* ——.

2.1.1.1 · There is that word "*Accrue*" again.

O'Brien pursued both USDA & FDA with many "*writings*".—Witness— the list of such in the "Attachment B" to form I—mandatory interrog's to his complaint in court.

And we have seen from foregoing

Para 1.1.1.1
1.1.1.2
1.1.1.3
1.1.1.4

That final "accrue"/"case built"—occured about *6 May 97*.

2.1.1.2 And of course, O'Brien has already stated that USDA/FDA has never mailed anything to O'Brien via certified or registered USPS mail.

And, also PLS see 28 USC 2675-O'C Pg 880.

And, O'Brien has option to claim "anytime" as final denial of claim! After elapse of 6 months of claiming to USDA &/or FDA.

2.1.1.2 PLS note that FDA—of its own volition resurrected 'Food Application Petition'—FAP #7A4045 and promptly changed its number to FAP #7A4530 about *10 Dec 96*—then they took until about *Oct 97* to finally deny the resurrected petition. (*Ref:PTP3-25*)

Note that case 2:97-CV-0145-WCO was filed in court on *25 Aug 97*.

Hence O'Brien simply beats the 2 year 'window' *again* —10 Dec 96 to 25 Aug 97—9 months:

3.0 "Exclusiveness of remedy ref—O'C Pg 881/2.

3.1 One has to wonder what was motivating U.S. lawyer Ms Beranek to push torts and admin remedies? And it may be because of the "Exclusive"/"Preclude"—"*Shut Out*" feature of these as defined under 28 USC 1346b and 28 USC 2672.

However this approach cannot work and shall fail because of the following:

3.1.1 This does not apply for violation of the U.S. Constitution. [has occured]

This does not apply to violations of U.S. Statutes. [has occured]

This does not apply to any claim arising out of:—(Ref: 28 USC 2680—ref: 28 USC 1346b).

1—Abuse of Process—[has occured]

2—Libel—[has occured]

3—Misrepresentation—[has occured]

4—Deceit—[has occured]

5—Interference with Contract Rights—[has occured]

28 USC 1346b/Torts of less than $10k. So does not apply to O'Brien case.

28 USC 2672; 2679—'Failed to operate' because USDA/FDA would not answer the O'Brien question—Is admin remedy exhausted? They *even wrote*, that *they would not* answer!!

4.0 Simply then, O'Brien shall prevail in this civil suit.

5.0 Respectfully submitted for the court's consideration.

Thanking you in anticipation, best regards,

/s/ Gerard T. O'Brien
GERARD T. O'BRIEN
2162 Skyline Dr
Gainesville, GA 30501
(770) 532-7367
5 Feb. 98

UNITED STATES DISTRICT COURT

September 2, 1997

Mr. Gerard T. O'Brien
2162 Skyline Drive
Gainesville, Georgia 30501

Dear Mr. O'Brien:

This will acknowledge receipt of your recent letter addressed to Judge Moye. In response to your letter, I submit the following:

1. Insofar as I know, there are no page limitations of any kind on an original complaint.

2. You have a constitutional right to proceed pro se on the basis of any individual complaints that you have.

3. I have no authority and would not presume to suggest to Judge O'Kelley whether or not he should recuse himself in any matter, including this matter.

Your very truly,

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL

UNITED STATES DISTRICT COURT

June 12, 1995

Mr. Gerard T. O'Brien
2162 Skyline Drive
Gainesville, Georgia 30501

Dear Mr. O'Brien

The honorable William C. O'Kelley has forwarded your correspondence dated April 19, 1995, to me and has asked that I provide you with a response.

This court is without authority to act in any matter unless there is pending before the court an action specifically concerning that matter. Thus, this court is unable to take any action regarding the alleged infringement upon your intellectual property rights.

If you wish to pursue a civil action in this court, you must file your action in the clerk's office, and must pay the appropriate filing fee. You should send all pleadings to the attention of the Clerk's office, not directly to any individual judge.

Sincerely,

/s/ Jan Huber
JAN HUBER
Staff Law Clerk